

**PUBLIC INTEGRITY COMMISSION  
MINUTES  
July 16, 2019**

**1. Call to Order:** 10:00 a.m. Present: Bonnie Smith (Chair); William F. Tobin, Jr. (Vice-Chair), Michele Whetzel (Vice-Chair); Commissioners: Andrew Manus, Gary Simpson, Rourke Moore. Commission Counsel: Deborah J. Moreau, Esq.

**2. Approval of the Minutes for June 18, 2019:** Moved—Commissioner Manus; seconded—Commissioner Tobin. Vote 6-0, approved.

**3. Administrative Items**

**A.** Welcome to new Commissioners: The Honorable Gary Simpson and the Honorable Rourke Moore.

**B.** Budget for FY 2020.

**4. Motion to go into Executive Session<sup>i</sup> to Hear Requests for Advisory Opinions and Waivers; Review Complaints:** Moved—Commissioner Manus; seconded—Commissioner Whetzel. Vote 6-0, approved.

**5. 19-27—Complaint Personal Interest**

**I. Procedure**

Any person may file a sworn Complaint alleging violations of Title 29, Delaware Code, ch. 58. 29 *Del. C.* § 5810(a). On June 11, 2019, [a person] submitted a sworn Complaint against [a board member]. PIC received the Complaint via U.S. Mail on June 24, 2019. The Complaint was not notarized in the appropriate format. 29 *Del. C.* § 4328(3). See *Hanson v. PIC*, 2012 WL 3860732 (Del. Super. Aug. 30, 2012) (*aff'd PIC v. Hanson*, 69 A.3d 370 (Del. 2013)). However, assuming the notarization could be easily fixed and re-submitted at a later date, the Commission reviewed the Complaint to determine if the allegations were frivolous or failed to state a violation. 29 *Del. C.* § 5809(3); *Commission Rules*, p.3, III(A).

At this stage of the proceedings all facts were assumed to be true. 29 *Del. C.* § 5808(A)(a)(4). Allegations that were deemed to be frivolous or that failed to state a claim should be dismissed. 29 *Del. C.* § 5809(3). However, seeing no frivolous allegations suitable for dismissal, the Commission then examined the allegations to determine if a majority of the Commission had reasonable grounds to believe a violation may have occurred. *Id.* "Reasonable grounds to believe" is essentially whether there was any reasonably conceivable set of circumstances susceptible of proof of the allegation. *Spence v. Funk*, 396 A.2d 967 (Del. Super., 1978) (interpreting motion to dismiss under Super. Ct. Civ. Rule of Procedure 12(b)).

**II. Jurisdiction:**

The Commission's jurisdiction is limited to interpreting Title 29, Del. C., ch. 58. See, e.g., 29 *Del. C.* § 5808(a) and § 5809(2). It may only act if it has jurisdiction over the party charged and jurisdiction over the complaint's substance.

### **A. Personal Jurisdiction**

[The board member] fell within the definition of “State employee” and was subject to the State Code of Conduct. 29 *Del. C.* § 5804(12)(a)(3).

### **B. Subject Matter Jurisdiction**

The Commission may only address alleged violations of “this chapter”-Title 29, ch. 58. 29 *Del. C.* § 5810(h). The Complaint alleged that [a board member] discussed and voted on a [matter involving a family member]. In so doing, it was alleged that he/she violated the Code of Conduct’s prohibition against reviewing and disposing of matters in which the official has a personal or private interest (29 *Del. C.* §§ 5805(a)(1) and (2)) and creating an appearance of impropriety amongst the public. 29 *Del. C.* § 5806(a). Both of those allegations fell within the Commission’s jurisdiction.

## **III. Facts**

In the spring of 2018, the board decided to review salaries paid to [various employees under the purview of the board]. In pursuit of that endeavor, the board formed a committee to work on the project. The committee met in executive session and discussed the project in May, June, July and August 2018. During those meetings, [board member] discussed salaries, including the proposed salary of [a family member]. In August 2018, the salary recommendations were presented to the full board and discussed at length. During a public meeting in September 2018, [a board member] voted in favor of the salary adjustments. At no time did [the board member] recuse him/herself from discussing and advocating for [the family member’s] recommended salary adjustment.

[Complainant] contacted the board President and raised concerns about whether it was appropriate for [the board member] to participate in, and vote on, the salary plan. [The board President] passed that information to the board’s legal counsel. The board’s counsel interpreted the statute as allowing [the board member] to vote on the salary plan and suggested that [Complainant] was confused about how to apply the statute. [Complainant] filed the Complaint because the board did not take any steps to correct what he/she perceived to be an ethics violation.

## **IV. Applicable Law**

### **A. In their official capacity, employees may not review or dispose of matters if they have a personal or private interest in a matter before them. 29 *Del. C.* § 5805(a)(1).**

A personal or private interest in a matter is an interest which tends to impair a person’s independence of judgment in the performance of the person’s duties with respect to that matter.” 29 *Del. C.* § 5805(a)(1). As a matter of law, a person has a personal or private interest if any decision “with respect to the matter would result in a financial benefit or detriment to accrue to the person or a close relative to a greater extent” than others similarly situated or if “the person or a close relative has a financial interest in a private enterprise which would be affected” by a decision on the matter to a greater or lesser degree than others similarly situated. 29 *Del. C.* § 5805(a)(2)(a) and (b). ‘Close relative’ is defined as “a person’s parents, spouse, children (natural or adopted) and siblings of the whole and half-blood.” 29 *Del. C.* § 5804(1).

A personal or private interest is not limited to narrow definitions such as “close relatives” and “financial interest.” 29 *Del. C.* § 5805(a)(2). Rather, it recognizes that a State official can have a

“personal or private interest” outside those limited parameters. It is a codification of the common law restriction on government officials. See, e.g., *Commission Op. Nos. 00-04 and 00-18*. When there is a personal or private interest, the official is to recuse from the outset and even neutral and unbiased statements are prohibited. *Beebe Medical Center v. Certificate of Need Appeals Board*, C.A. No. 94A-01-004 (Del. Super. June 30, 1995), *aff’d*, No. 304 (Del., January 29, 1996).

Obviously, [the board member’s family member] was a ‘close relative’. As such, [the board member] should not review and dispose of matters pertaining to [the family member] while serving in his/her official capacity on the board. However, despite the law, [the board member] discussed and voted on [the family member’s] salary instead of recusing him/herself as was proper.

Officials subject to the State Code of Conduct often argue that their actions “with respect to the matter” did not result in “a financial benefit or detriment to accrue to the person or a close relative to a greater extent than others similarly situated” because their actions involved other people, in addition to their relative, and that everyone in similar classifications received the same treatment. That reasoning is flawed. The legal parameters of § 5805(a)(1) are not defined by § 5805(a)(2).

First, the Code of Conduct has a clear and specific definition section. See, 29 *Del. C.* § 5804. Second, within the clear text of § 5805(a)(1), the second sentence reads “a personal or private interest is one which tends to impair independence of judgment. . . .” Thus, within that provision the law spells out what constitutes a “personal or private interest.” Third, the Delaware Supreme Court has affirmed an interpretation of § 5805(a)(1) independent of § 5805(a)(2). See, *Beebe Medical Center v. Certificate of Need Appeals Board*, Del. Super., C.A. No. 94A-01-004, Terry, J. (June 30, 1995), *aff’d*, Del. Supr., No. 304, Veasey, C. J. (January 29, 1996). Fourth, the Commission has held that § 5805(a)(1) is a codification of the common law restriction on public officials having a personal or private interest. *Commission Op. Nos. 97-24; 97- 30; and 00-04*. That is because conflict of interest statutes generally do not abrogate common law conflict of interest principles. 63C *Am. Jur. 2d Public Officers and Employees* § 253 (1997).

The [relative was one of numerous employees whose salary was being reviewed by the committee. However, the relative was only one of two people [in a particular category]. The Complaint specified that the salaries of the [two people in that category] were considered separately during discussions of the salary review project. As a result, even within the broader context of salary discussions, [the family member’s] salary was discussed on a narrower scale of one out of two.

As a result of the aforementioned conduct the Commission determined it was reasonable to believe that violations of both 29 *Del C.* §§ 5805(a)(1) and 5805(a)(2)(a) occurred.

**B. Employees may not engage in conduct that may raise suspicion among the public that they are engaging in conduct contrary to the public trust. 29 *Del. C.* § 5806(a).**

The purpose of the code is to insure that there was not only no actual violation, but also not even a “justifiable impression” of a violation. 29 *Del. C.* § 5802. The Commission treated that as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test was whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the official’s duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). Thus, in deciding the appearance of impropriety issue, the Commission looked at the totality of the circumstances. See, e.g., *Commission Op. No. 97-23 and 97-42*. Those circumstances were examined within the framework of the Code’s purpose which is to achieve a balance between a “justifiable impression” that the Code was being violated by an official, while not “unduly circumscribing”

their conduct so that citizens are encouraged to assume public office and employment. 29 Del. C. §§ 5802(1) and 5802(3).

The Commission considered the totality of the circumstances surrounding [the board member's] discussion and vote on his/her [family member's] salary and whether it was likely to create an appearance of impropriety amongst the public. First, the salary discussions were held in executive session, as is required when discussing personnel matters, but it also meant that the process was not transparent. Second, [the board member's] input and vote on salaries [for the particular category] was focused on two people, one of whom was [a family member]. Third, it would be difficult for [the board member] to argue that requiring his/her recusal for matters pertaining to [the relative's] employment would be 'unduly circumscribing' his/her conduct because it was a small part of his/her overall board duties. In mitigation, [the board member had sought advice] regarding his/her ability to vote. The Commission decided it was unlikely that the public would believe that [the board member's] actions were directed towards the classification of the position without being influenced by [the family relationship].

## **V. Decision**

Because [Complaint's submission] was not properly notarized, the Commission decided to rule on the Complaint before them, assuming that [Complainant] would re-submit the Complaint with the proper notarization. 29 Del. C. §§ 5809(3) and 5810(a). The Commission decided that the allegations in the Complaint were substantiated by adequate facts to support a reasonable inference of a violation and the matter would be set for a hearing after the Complaint was re-submitted.

Moved—Commissioner Manus; seconded—Commissioner Whetzel. Vote 6-0, approved.

## **6. 19-28—Complaint Using State Time and Resources for Personal Advancement** *(Commissioner Simpson recusing and left the meeting)*

### **I. Procedure**

Any person may file a sworn Complaint alleging violations of Title 29, Delaware Code, ch. 58. 29 Del. C. § 5810(a). On June 25, 2019, [Complainant] submitted a sworn Complaint against [a State employee]. PIC received the Complaint (including Exhibit A) via email from [the Deputy Attorney General assigned to the agency] on June 26, 2019 and via State mail on July 1, 2019. The Complaint was notarized in the appropriate format. However, the Commission asked Commission Counsel to contact [the DAG] and inform him/her to re-submit the Complaint, removing any allegations related to 29 Del. C. § 5805(a) because the Commission did not believe that any of the alleged conduct applied to that provision in the Code of Conduct. The Complaint was re-submitted on August 2, 2019.

At this stage of the proceedings all facts were assumed to be true. 29 Del. C. § 5808(A)(a)(4). Allegations that are deemed to be frivolous or that failed to state a claim should be dismissed. 29 Del. C. § 5809(3). However, seeing no frivolous allegations suitable for dismissal, the Commission then examined the allegations to determine if a majority of the Commission had reasonable grounds to believe a violation may have occurred. *Id.* "Reasonable grounds to believe" is essentially whether there was any reasonably conceivable set of circumstances susceptible of proof of the allegation. *Spence v. Funk*, 396 A.2d 967 (Del. Super., 1978) (interpreting motion to dismiss under Super. Ct. Civ. Rule of Procedure 12(b)).

## **II. Jurisdiction:**

The Commission's jurisdiction is limited to interpreting Title 29, Del. C., ch. 58. See, e.g., 29 Del. C. § 5808(a) and § 5809(2). It may only act if it has jurisdiction over the party charged and jurisdiction over the complaint's substance.

### **A. Personal Jurisdiction**

State employees are defined as "any person...who serves as an appointed member, trustee, director or the like of any state agency...and receives...more than \$5,000 in compensation for such service in a calendar year." 29 Del. C. § 5804(12)(a)(2). State agency is defined as "any office, department, board, commission...existing by virtue of an act of the General Assembly or of the Constitution of the State..." 29 Del. C. § 5804(11). As a result, [Employee] fell within the Commission's jurisdiction.

### **B. Subject Matter Jurisdiction**

The Commission may only address alleged violations of "this chapter"-Title 29, ch. 58. 29 Del. C. § 5810(h). The Complaint alleged that [Employee] violated the Code of Conduct's: appearance of impropriety prohibition (29 Del. C. 5806(a)); prohibition against incurring obligations in substantial conflict with his/her state duties (29 Del. C. 5806(b)); and prohibition against using his/her State job for securing unwarranted privileges, private advancement and gain. (29 Del. C. 5806(e)). All of the alleged misconduct fell within the Commission's jurisdiction.

## **III. Facts**

[Employee] previously worked [for a regulating board under the purview of a State agency]. He/she worked in the position for five years. [Employee]'s responsibilities included: coordinating, planning meetings; providing analysis, advice and support in the development of rules and regulations regarding licensure; compiling statutorily mandated reports and disseminating the information to various government officials; other administrative management tasks.

Beginning in October 2018, [agency] employees began to question [Employee]'s frequent absences from the office. Those inquiries led the Human Resources Department to begin investigating the number and length of those absences. In a five month period between October 2018 and March 2019, [Employee] had 75 full, or partial, absences. That information was subsequently compared to [Employee]'s requests for leave, documentation of work completed; email communications (use and content); computer sign-in logs; ID badge access logs.

[Employee] was confronted with evidence that he/she had taken leave from the office on multiple occasions without submitting a leave slip so that the hours could be deducted from his/her vacation and sick time accrual. In essence, he/she was being paid for working when he/she was not in the office. After being confronted with that information, [Employee] submitted leave slips for a majority of the hours which were called into question. [Employee] was also confronted with emails he/she sent from his/her work computer, using his/her State email address, to individuals associated with [Employee]'s membership in numerous private organizations that were not related to, and sometimes conflicted with, his/her work duties.

After much discussion it was decided to refer the matter to PIC in the form of a Complaint. Subsequent to the submission of the Complaint, [Employee] resigned from his/her position even though

he/she was eligible to retire from State service. The [agency] was concerned that [Employee] would try to obtain another State position, which they felt was inappropriate given [Employee]'s professional behavior.

#### **IV. Applicable Law**

##### **A. Employees may not engage in conduct that may raise suspicion among the public that they are engaging in conduct contrary to the public trust. 29 Del. C. § 5806(a).**

The purpose of the code is to insure that there is not only no actual violation, but also not even a "justifiable impression" of a violation. 29 Del. C. § 5802. The Commission treated that as an appearance of impropriety standard. *Commission Op. No. 07-35*. The test was whether a reasonable person, knowledgeable of all the relevant facts, would still believe that the official's duties could not be performed with honesty, integrity and impartiality. *In re Williams*, 701 A.2d 825 (Del. 1997). Thus, in deciding appearance of impropriety issues, the Commission looks at the totality of the circumstances. See, e.g., *Commission Op. No. 97-23* and *97-42*. Those circumstances should be examined within the framework of the Code's purpose which is to achieve a balance between a "justifiable impression" that the Code was being violated by an official, while not "unduly circumscribing" their conduct so that citizens are encouraged to assume public office and employment. 29 Del. C. §§ 5802(1) and 5802(3). Conversely, conclusory allegations of a conflict of interest without specific factual grounds are insufficient to state a claim. See, e.g. *Camas v. Delaware Board of Medical Practice*, Del. Super., C.A. No. 95A-05-008, J. Graves (November 21, 1995).

The Complaint (including Exhibit A) went into great detail about the facts supporting each alleged violation of the Code of Conduct. In support of a finding of a violation of this provision, the Complaint alleged that [Employee]:

- Had excessive, unexplained absences from work.
- Used State email to discuss gambling with [employees subject to the agency's regulation].
- Assisted [someone] who was seeking certification required by the [agency].
- Recommended personal friends for nomination to [a coveted workgroup] to the exclusion of up to 9,000 other [eligible employees].
- Communicated that [the agency] was unwilling to pay for training rather than the fact that it was not authorized to pay for training.
- Misrepresented to [a high ranking agency official] that a fundraising effort at [an annual banquet] would benefit all members of [a specific regulated group] when it only benefitted [a few people to the exclusion of others].
- Sent a resume to one [regulated group to the exclusion of others]. He/she used State equipment.
- Used his/her State time and equipment to complete a college paper for a relative.

After thoroughly reviewing the Complaint and Attachment A, a majority of the Commission found reasonable grounds to believe multiple violations of 29 Del. C. § 5806(a) may have occurred.

**B. No state employee, state officer or honorary state official shall have any interest in any private enterprise nor shall such state employee, state officer or honorary state official incur any obligation of any nature which is in substantial conflict with the proper performance of such duties in the public interest. No state employee, state officer or honorary state official shall accept other employment, any compensation,**

**gift, payment of expenses or any other thing of monetary value under circumstances in which such acceptance may result in any of the following: (1) Impairment of independence of judgment in the exercise of official duties; (2) An undertaking to give preferential treatment to any person; (3) The making of a governmental decision outside official channels; or (4) Any adverse effect on the confidence of the public in the integrity of the government of the State. 29 Del. C. § 5806(b).**

In support of a finding of a violation of this provision, the Complaint alleged that [Employee]:

- Performed work on behalf of several private organizations with connections to the [Employee's career field].
- Advocated for, encouraged and raised funds for two [regulated entities] so they could participate in an event related to his/her personal interests to the exclusion of other [eligible entities].
- Used State time and resources to work on his/her private endeavors.
- Used his/her State resources to solicit consulting fees.
- Used his/her State time and resources to recruit [multiple regulated entities for a trip sponsored by his/her private interest, to the exclusion of other qualified entities].

After review of the relevant facts and circumstances; the Complaint; and the statute, a majority of the Commission found reasonable grounds to believe multiple violations of this section of the Code of Conduct may have occurred. "Reason to believe" means "probable cause." *Coleman v. State*, 562 A.2d 1171, 1177 (Del., 1989). "Probable cause" means facts and circumstances are enough to warrant a person of reasonable caution to believe an offense occurred. *State v. Cochran*, 372 A.2d 193, 195 (Del., 1977).

**C. No state employee, state officer or honorary state official shall use such public office to secure unwarranted privileges, private advancement or gain. 29 Del. C. § 5806(e).**

In support of a violation of this provision, the Complaint alleged that [Employee]:

- Used his/her State email and State title to secure preferential treatment from his/her daughter's landlord.
- Used his/her State email to seek employment with a private organization.
- Used his/her State email and title to seek a discount on a hotel room.

After review of the Complaint, Attachment A and the statute, a majority of the Commission found reasonable grounds to believe multiple violations of this section of the Code of Conduct may have occurred.

**D. No state employee, state officer or honorary state official shall engage in any activity beyond the scope of such public position which might reasonably be expected to require or induce such state employee, state officer or honorary state official to disclose confidential information acquired by such official by reason of such public position. 29 Del. C. § 5806(f).**

In support of a violation of this provision, the Complaint alleged that [Employee]:

- Revealed to [three non-State employees that one regulated person] had done something “stupid”.

Following a review of the Complaint, Attachment A and the statute, a majority of the Commission found reasonable grounds to believe that a violation of this section of the Code of Conduct may have occurred.

## **V. Decision**

Based on the above facts and law, a majority of the Commission found that there was reason to believe that violations of 29 Del. C. §§ 5806(a); 5806(b); 5806(e); and 5806(f) may have occurred. The matter was to be scheduled for a formal hearing.

Moved—Commissioner Manus; seconded Commissioner Moore. Vote 5-0, approved. Commissioner

**7. Motion to go out of Executive Session:** Moved—Commissioner Whetzel; seconded—Commissioner Manus. Vote 5-0, approved.

## **8. Adjournment**

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<sup>i</sup> Pursuant to 29 Del. C. § 10004(6) to discuss non-public records (29 Del. C. § 10002(6) Any records specifically exempted from public disclosure by statute or common law), as the written statements required for advisory opinions and complaints are subject to the confidentiality standards in 29 Del. C. § 5805(f), 29 Del. C. § 5807(d) Advisory Opinion Requests, and 29 Del. C. § 5810(h) for Complaints. Further, the proceedings, like personnel actions are, by statute, closed unless the applicant for the advisory opinion requests a public meeting, 29 Del. C. § 5805(f), 29 Del. C. § 5807(d), or the person charged in a complaint requests a public meeting. 29 Del. C. § 5810(h). No applicant for an advisory opinion, nor a person charged by a complaint has requested an open meeting.